

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDWARD G. RYBECK

Claimant

VS.

HUSKY HOGS, LLC

Respondent

AND

KANSAS LIVESTOCK ASSOC. RISK MGT.

Insurance Carrier

Docket No. **1,059,545**

ORDER

Claimant requests review of the October 24, 2012 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Joseph Seiwert of Wichita, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the Judge Moore and consists of the transcript of the March 21, 2012 discovery and evidentiary deposition of claimant; the transcript of the March 21, 2012 discovery and evidentiary deposition of Laurel Bradbury; the transcript of the August 10, 2012 preliminary hearing and exhibits thereto; Dr. John P. Estivo's report dated August 17, 2012; Dr. Vito J. Carabetta's report dated October 4, 2012; and all pleadings contained in the administrative file.

Judge Moore ruled claimant sustained aggravations of preexisting conditions, but failed to prove his work-related accident was the prevailing factor in causing his injuries, medical conditions or disability. Judge Moore further ruled claimant failed to prove any change to the physical structure of his body as a result of the accident.

ISSUES

Claimant requests review and argues his accident was the prevailing factor in causing his injuries, medical conditions and resulting disability. Claimant asserts his injury did not solely result in aggravation, acceleration or exacerbation of preexisting conditions. Claimant argues he is not required to prove an identifiable change to the structure of his body. Claimant contends that increased symptoms, such as pain, infer a physical injury. Claimant asserts that if he proved a compensable left upper trapezius injury, any and all body parts affected by his accident are also compensable. Claimant requests medical treatment and payment of temporary total disability benefits.

Respondent requests the Board affirm Judge Moore's preliminary hearing Order and asserts claimant's accident merely resulted in a temporary aggravation of preexisting conditions and was not the prevailing factor in causing claimant's injuries, medical conditions and resulting disability.

The issues before the Board are:

1. Compensability, including:
 - A. Did claimant prove his accident was the prevailing factor in causing his injury, medical condition and resulting disability?
 - B. Did claimant's injury solely aggravate, accelerate or exacerbate preexisting conditions?
 - C. Did claimant need to prove, or did prove, a change in the physical structure of his body?
2. Is claimant entitled to temporary total disability benefits or medical treatment?

FINDINGS OF FACT

Claimant worked for respondent as a hog farm manager. On November 3, 2011, he was assisting a driver who was on top of a trailer. The driver fell between six to eleven feet. Claimant tried to catch the driver and break his fall. Claimant was struck and knocked to the ground. Claimant alleges injuries to his left shoulder, neck and low back.

Claimant has a long history of low back problems. He sustained a low back strain on May 5, 2008 when moving a refrigerator. Due to having back and bilateral leg pain, claimant had a July 7, 2008 lumbar spine MRI that showed mild to moderate disk degeneration at L4-5 with mild degenerative central spinal stenosis at L4-5.

Dr. Ferrill Conant's July 25, 2008 report indicated claimant had chronic back pain - "like a rock in [his] low back."¹ Claimant also reported chronic neck pain. Dr. Conant prescribed Tramadol on July 30, 2008. Dr. Conant's August 22 and October 24, 2008 reports show claimant was following a home back exercise program for chronic back pain, in addition to taking Tramadol. On January 26, 2009, claimant asked Dr. Conant if he should have another MRI to check for "nerve damage."²

¹ P.H. Trans., Resp. Ex. A at 50.

² *Id.* at 53.

An ATV fell backwards and landed on claimant on March 14, 2009. Claimant was treated at Good Samaritan Hospital and reported “some slight lower back pain, some of which she [sic] has had in the past.”³ Claimant followed-up with Dr. Chinyere Obasi on March 23, 2009, and reported some lower back pain that worsened as the day progressed.

Dr. Conant’s April 20, 2009 report indicated claimant’s ATV accident resulted in pain and “fire and burning”⁴ in his low back that would sometimes radiate to the pelvis, testicles and the anterior thighs. A handwritten note concerns pain, burning and radiation down claimant’s legs. Claimant had diffuse lumbar spine tenderness. Dr. Conant noted claimant had radicular pain in the medial thighs and down to the right foot. Claimant was prescribed Percocet in addition to Tramadol.

An April 24, 2009 CT of claimant’s lumbar spine showed a remote anterior compression fracture of L5, mild disk space narrowing at L4-5 and L5-S1 with probable broad-based disk bulging, most pronounced at L4-5, in addition to probable minimal broad-based disk bulging at L2-3 and L3-4, in addition to minimal neuroforaminal narrowing at L4-5 and L5-S1 bilaterally. The radiologist indicated claimant had mild multilevel degenerative changes of the lumbar spine.

Claimant returned to Dr. Conant on April 30, 2009 for back and bilateral anterior thigh pain. Claimant was referred for a lumbar epidural steroid injection (LESI). Robert A. Miller, CRNA, administered the LESI at Mitchell County Hospital on May 7, 2009. Claimant told Mr. Miller he had low back and bilateral leg radicular symptoms, difficulty with ambulation and stair climbing, as well as bilateral lower extremity tingling and numbness.

Dr. Conant prescribed Oxycodone on May 14, 2009. On May 28, 2009, claimant reported an initial improvement with his radicular pain following his LESI, but declined a repeat injection because he had a pay cut. Dr. Conant continued claimant on Percocet or Oxycodone until October 23, 2009, but kept him on Tramadol and Amitriptyline.

Dr. Conant’s April 7 and October 13, 2010 reports indicate claimant had chronic back pain. Dr. Conant recommended claimant continue daily back exercises. Claimant returned to Dr. Conant on August 10, 2011. Such record states:

Patient complains of spinal stenosis, lumbar region, without neurogenic claudication. His symptoms are stable since last visit. The discomfort is most prominent in the lumbar spine. This is a chronic problem, with essentially constant pain. He notes some pain relief with Tramadol and Amitriptyline.⁵

³ *Id.* at 34.

⁴ *Id.* at 54.

⁵ *Id.* at 68.

Following claimant's November 3, 2011 accident, he went to Norton County Hospital on November 7, 2011 for left shoulder complaints. He reported a history of back trouble and said a doctor had him on Hydrocodone and Ultram. Left shoulder x-rays showed acromioclavicular (AC) degenerative changes. Claimant passed a drug screen that day.

Claimant returned to Norton County Hospital on November 30, 2011 with continued left shoulder pain. He also reported some low back and neck pain.

Dr. Heber Crockett evaluated claimant for left shoulder pain on December 15, 2011. Dr. Crockett assessed AC arthritis, underlying partial RTC tear and Type I SLAP lesion. Dr. Crockett injected claimant's AC joint and took him off work until December 19, 2011.

On January 25, 2012, claimant presented to Dr. Conant for left superior shoulder pain radiating to his neck and low back pain and burning in his right leg. Dr. Conant wanted claimant evaluated for "back and leg complaints that also are related to his work injury."⁶

Joel McReynolds, Dr. Crockett's physician's assistant, evaluated claimant on January 27, 2012, for left shoulder and low back pain. Claimant was provided light duty restrictions. Mr. McReynolds ordered physical therapy and referred claimant to James Mahalek, M.D, for a low back evaluation.

Claimant reported to Phillips County Hospital on January 28, 2012, for left shoulder, neck, mid-back pain and low back pain, left leg pain and tingling in his right leg. He was taken off work from January 29 through January 31, 2012.

Claimant obtained a February 6, 2012 off work slip from Dr. Conant. Dr. Conant indicated claimant needed to be off work due to his shoulder and back.

Respondent terminated claimant on February 7, 2012 in connection with drug testing. The parties have different versions as to what occurred.⁷

Claimant was seen by Dr. Mahalek and his physician's assistant, Jason Fritzen, on February 20, 2012. Claimant's chief complaint was low back and right leg pain. He also reported numbness, tingling and weakness. X-rays showed moderate degenerative disk disease with disk collapse at L4-5. Dr. Mahalek and Mr. Fritzen indicated claimant likely had instability at L4-5, as well as possible disk herniation causing stenosis and radiculopathy. They recommended a lumbar MRI, epidural steroid injections, physical therapy and possible surgery. Claimant was provided light duty restrictions.

⁶ P.H. Trans., Resp. Ex. A at 72, 74, 77 (this medical report is in the exhibit three times).

⁷ This appeal does not concern whether claimant was terminated for cause or whether respondent would have accommodated claimant's restrictions but for his termination.

A March 5, 2012 lumbar MRI showed moderate to advanced degenerative disk disease at L4-5, advanced facet arthropathy, severe central spinal stenosis, an old limbus vertebra formation at L5 and disk desiccation and bony spondylosis at L1-2, L2-3 and L3-4.

Dr. Mahalek evaluated claimant after his lumbar MRI on March 5, 2012, and noted claimant had "an unstable segment at L4-5 of his spine." Dr. Mahalek further stated, "I explained that I believe that he is symptomatic from the L4-5 level of his spine given the severity of the stenosis and the instability present. I do think this relates back to his work injury." He recommended lumbar decompression with laminectomy at L4-5 and fusion. Claimant was maintained on light duty restrictions.

Claimant returned to Dr. Crockett on May 2, 2012. Dr. Crockett recommended an MRI-arthrogram of the left shoulder and continuation of claimant's current restrictions. Dr. Crockett diagnosed left shoulder scapular dyskinesia, possible partial RTC tear, possible SLAP tear and AC joint arthritis.

Claimant's May 30, 2012 left shoulder MRI-arthrogram showed very advanced degenerative changes with inflammation at the AC joint, an intact rotator cuff and a possible or suspected posterior labral tear. After reviewing such films, Dr. Crockett noted claimant had an old AC joint fracture and might experience great relief from surgery. Dr. Crockett restricted claimant to light duty, with no lifting over five pounds.

Dr. George Flutter evaluated claimant at his attorney's request on May 17, 2012. Claimant complained of pain affecting his neck, upper back, left shoulder girdle and lower back, along with weird feelings in his left arm and a buzzing sensation in his right leg. Claimant reported pain radiating from his neck to his upper back. Dr. Flutter's assessment included: (1) status post work-related injury; 11/03/11; (2) neck/upper back pain; (3) cervicothoracic strain/sprain; (4) left shoulder pain/impingement/tendonitis/bursitis; (5) possible left shoulder internal derangement; (6) low back pain; (7) lumbosacral strain/sprain; and (8) intermittent right lower extremity dysesthesia.

Dr. Flutter indicated claimant's 2009 ATV accident caused back pain that required epidural steroid injections, but stated claimant reported no further problems resulting from such accident. In another section of his report, Dr. Flutter indicated the ATV injury resulted in no significant residual sequelae, at least according to claimant. Dr. Flutter opined the prevailing factor in claimant's current condition was his work injury.

Dr. Flutter indicated claimant should have temporary light duty restrictions. Dr. Flutter made eleven different treatment recommendations including medication, imaging studies, physical therapy, use of a TENS unit, potential pain management, continued treatment for the left shoulder and lumbar spine, possible surgery, and either neurosurgical or orthopedic consultation for claimant's cervical spine.

John P. Estivo, D.O., evaluated claimant at respondent's request on August 17, 2012. Dr. Estivo basically indicated claimant had preexisting left AC degenerative joint disease, preexisting advanced L4-5 degenerative disk disease, and symptom magnification. Dr. Estivo opined claimant's advanced AC joint arthritis was a natural consequence of aging and claimant may have sustained an aggravation of such preexisting condition, but the injury did not cause his arthritis. Dr. Estivo opined that the prevailing factor in claimant's left shoulder pain was his preexisting AC joint arthritis, not the work incident.

Dr. Estivo indicated claimant's lumbar spine pain was present for years and required treatment up until the November 3, 2011 accident. Dr. Estivo noted claimant's lumbar condition was perhaps temporarily aggravated by the accident, but concluded claimant's preexisting advanced degenerative disk disease at L4-5 was the prevailing factor in claimant's lumbar spine and lower extremity symptoms. Dr. Estivo opined claimant did not need medical treatment or restrictions and had no impairment as a result of the accident.

Judge Moore ordered a neutral IME with Vito J. Carabetta, M.D. Claimant was evaluated by Dr. Carabetta on October 4, 2012. Dr. Carabetta's impression was that claimant had a chronic left upper trapezius muscle sprain, left shoulder acromioclavicular joint arthritis and lumbar degenerative disk disease. Dr. Carabetta noted:

The patient presents with quite a complex medical history. He is quite clear that he had no prior cervical area complaints. Review of the medical records really did not disclose specifics about the cervical spine itself. Fortunately, though there was no diagnostic workup I could find with regard to the cervical spine, the physical examination is rather unremarkable in terms of any neurologic defects stemming from the cervical spine area. However, he does have evidence of myofascial change in the left upper trapezius muscle region. This is an area for which physical therapy measures such as spray and stretch technique and myofascial release methods, and the use of some medications would be helpful. Clearly the incident of November 3, 2011 was indeed the prevailing factor with regard to the development of complaints in this area. The principal issue at the left shoulder has been one of acromioclavicular joint arthritis that is indeed quite advanced. Development of such changes would've required many years. This was not specifically created by the incident in question, but it appears that though there is a prevailing factor of underlying arthritic changes, the incident in question of November 3, 2011, caused an aggravation of the underlying condition. Finally, in the lower back region he is found to have lumbar degenerative disk disease. The diagnostic workup has not really demonstrated specific changes that are different from what was seen on previous studies from the years that preceded this. Though it appears that the incident in question has subjectively caused aggravation of the underlying condition, objectively no specific changes are apparent. The prevailing factor with regard to the lower back would be pre-existing changes that have been well-documented in his medical records.⁸

⁸ Carabetta Report, pp. 4-5 (Oct. 4, 2012).

Judge Moore stated in his preliminary Order:

Claimant has failed to establish that the work-related accident was the prevailing factor in causing Claimant's injuries, medical conditions or disability. His complaints are the result of symptomatic aggravations of pre-existing degenerative conditions. There is no evidence of any structural change in Claimant's body caused by the accident.⁹

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on claimant to establish claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

⁹ ALJ Order (October 24, 2012).

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

Before May 15, 2011, Kansas law allowed compensation for any aggravation, acceleration or intensification of a preexisting condition.¹⁰ The new statutory changes refute the prior understanding of the law: "[a]n injury is not compensable solely¹¹ because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."¹² An accident must now be the prevailing factor in causing an injury, medical condition and resulting disability or impairment. An injury resulting from the natural aging process, normal activities of day-to-day living or a risk personal to the worker does not arise out of or in the course of employment.

¹⁰ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

¹¹ The word "solely" is not defined in the Kansas Workers Compensation Act. Solely is defined as "singly" or "[e]xclusively." *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 228 P.3d 441 (Kansas Court of Appeals unpublished decision dated Apr. 8, 2010).

¹² K.S.A. 2011 Supp. 44-508(f)(2).

The Appeals Board has found accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition. Several prior decisions tend to show compensability where there is a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.¹³
- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.¹⁴
- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.¹⁵
- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.¹⁶
- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.¹⁷
- A motor vehicle accident did not solely aggravate, accelerate or exacerbate claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.¹⁸

In all of these cases, claimant proved his or her accident was the prevailing factor in causing the injury, medical condition and resulting disability.

¹³ *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

¹⁴ *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

¹⁵ *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB Jul. 13, 2012).

¹⁶ *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

¹⁷ *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

¹⁸ *Gilpin v. Lanier Trucking Co.*, No. 1,059,754 (Kan. WCAB Nov. 20, 2012).

Compensability of Claimant's Lumbar Condition

Claimant did not prove a low back injury beyond a sole aggravation of a preexisting condition, which is not compensable. Dr. Estivo and Dr. Carabetta agree the prevailing factor in claimant's low back problem is his preexisting degenerative disk disease and the November 3, 2011 injury was not the prevailing factor in causing claimant's condition, need for medical condition or disability. Based on the evidence compiled to date, this Board Member agrees with Judge Moore's conclusion that claimant merely had a symptomatic aggravation of a preexisting condition and claimant failed in his burden of proving that his work-related accident was the prevailing factor in his present lumbar condition.

Dr. Fluter's opinion that the November 3, 2011 injury was the prevailing factor in causing claimant's low back problem and need for treatment is rejected for being based on claimant reporting "no further problems" or "no significant sequelae"¹⁹ from his 2009 ATV accident. Claimant's testimony that his prior back problems were minor and not chronic is not credible. Claimant had a chronic low back condition for at least three years before his 2011 accident. Dr. Conant's August 10, 2011 report noted "essentially constant" lumbar pain, diffuse degenerative arthritis and lumbar spinal stenosis.²⁰

Drs. Conant and Mahalek indicated claimant's back and leg complaints were "related" to his work injury. Whether claimant's symptoms "relate" to a work injury is relevant, but not the legal standard for compensability. Drs. Conant and Mahalek did not provide prevailing factor opinions or state if claimant had more than an aggravation of a preexisting condition. Also, it is unknown whether Dr. Mahalek was aware of claimant's prior imaging studies or claimant's longstanding history of chronic low back pain.

Proof of a Structural Change

Judge Moore ruled claimant failed to prove any bodily structural change due to the accident. Claimant argues on page 12 of his brief:

[T]here is no requirement of visual proof of a "structural change" in the statute. The requirement is that the change in the physical structure of the body that occurs with an injury *causes damage or harm* to the body. Any "harm," such as pain, is accompanied by physical changes in the structure of the body. There is no requirement to demonstrate the precise nature of that change, or that the change be visible. Symptoms result from such physical changes. The claimant must show "damage or harm to the body." The physical structure changes may be inferred from the resulting damage or harm (emphasis in original).

¹⁹ P.H. Trans., Res. Ex. A at 1, 7.

²⁰ *Id.* at 68.

Both K.S.A. 2011 Supp. 44-508(f)(1) and K.S.A. 2010 Supp. 44-508(e) state “personal injury” or “injury” is a “lesion or change in the physical structure of the body, causing damage or harm thereto.” The statute in effect before May 15, 2011 noted, “It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.” Such language is omitted in the current version of the statute.

Claimant also argues the March 5, 2012 MRI showed his L4-5 disk was unstable, and therefore, he proved a change in the physical structure of his body, not a sole aggravation of a preexisting condition. Dr. Mahalek actually noted both before and after the MRI that claimant had instability at L4-5. There was no proof that the MRI films demonstrated a change in claimant’s spine due to the November 3, 2011 accident. There is no medical evidence showing claimant’s L4-5 disk was stable prior to the injury. Dr. Carabetta stated, “The diagnostic workup has not really demonstrated specific changes that are different from what was seen on previous studies from the years that preceded this.”²¹ Even if claimant proved a physical change due to the accidental injury, he would still need to overcome the prevailing factor hurdle, which he did not accomplish.

Compensability of Claimant’s AC Joint Condition and Possible Labral Tear

Dr. Carabetta observed claimant’s injury caused an aggravation of his preexisting AC joint arthritis. Dr. Estivo noted claimant may have had an aggravation of his preexisting AC joint arthritis. A sole aggravation of claimant’s AC joint condition is not compensable. Dr. Estivo and Dr. Carabetta agree the prevailing factor in claimant’s preexisting AC joint problem was degeneration over time and the November 3, 2011 injury was not the prevailing factor in causing claimant’s condition, need for medical condition or disability. Based on the evidence compiled to date, this Board Member agrees with Judge Moore’s conclusion that claimant merely had a symptomatic aggravation of a preexisting condition and claimant failed in his burden of proving that his work-related accident was the prevailing factor in his AC joint condition.

Claimant had a possible or suspected left shoulder labral tear. Claimant argues the possibility of a labral tear proves he suffered more than a sole aggravation of a preexisting condition. A possibility does not rise to “more probably true than not true” burden of proof. Moreover, the tear, if present, could be due to a degenerative condition, aging or activities of daily living. Dr. Estivo noted the May 30, 2012 left shoulder MRI showed degenerative changes to the labrum. There was no proof the possible labral tear was compensable.

Claimant also did not prove that his November 3, 2011 accident caused a physical injury, as defined under K.S.A. 2011 Supp. 44-508(f)(1), to his AC joint.

²¹ Carabetta Report, p. 5 (Oct. 4, 2012).

Compensability of Claimant's Left Upper Trapezius Condition²²

Claimant's left upper trapezius injury is compensable. Dr. Carabetta found claimant had diffuse left upper trapezius muscle spasms and associated tenderness. Dr. Carabetta opined the November 3, 2011 injury was "clearly" and "indeed"²³ the prevailing factor in causing such condition. There is no evidence claimant's left upper trapezius injury was preexisting, a personal condition, due to age or activities of daily living. Dr. Carabetta recommended physical therapy and medication for claimant's left upper trapezius.

Claimant argues:

Does the requirement that an "injury" be caused by something more than "solely" an aggravation, acceleration or exacerbation apply to *each* condition caused by the work injury, or is it sufficient that there be something more to any injured body part? The statute does not address this point, but because there is clearly additional injury to claimant's left trapezius, this case is clearly outside the "solely" aggravation type of case. There is no requirement in the statute that each individual condition resulting from an accident be based on more than an aggravation. Any injury caused by more than an aggravation renders any and all injuries resulting from the accident compensable (emphasis in original).²⁴

This Board Member disagrees. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition. Such prohibition applies to any and all aggravations, accelerations or exacerbations of preexisting conditions, regardless of a claimant proving that an individual body part associated with his or her case is compensable. As applied to this case, there is nothing in the new law demonstrating that new law defenses are null and void regarding claimant's lumbar and AC joint conditions based on claimant proving compensability of his left upper trapezius condition. Additionally, whether an injury "results" from an accident is not the legal standard for compensability.

Temporary Total Disability and Medical Benefits

At this stage of the proceedings, the authority and discretion to order temporary total disability or medical benefits rests with Judge Moore, not the Appeals Board. Insofar as this Board Member finds claimant's left upper trapezius is compensable, this matter is remanded to Judge Moore for determination as to whether claimant is entitled to any benefits due to such condition.

²² Claimant references a "left trapezius neck" condition on page 15 of his brief, but did not argue for a compensable neck injury. Absent adequate argument, the Board considers the neck issue abandoned. See *Herrell v. Nat'l Beef Packing Co., LLC*, 292 Kan. 730, 736, 259 P.3d 663 (2011).

²³ Carabetta Report, p. 5 (Oct. 24, 2012).

²⁴ Claimant's Brief at 14 (filed Nov. 20, 2012).

CONCLUSION

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds: (1) claimant solely sustained aggravations of his preexisting lumbar spine and AC joint conditions, but failed to prove his November 3, 2011 accident was the prevailing factor in causing his lumbar spine or left AC joint injuries, medical conditions or resulting disability; (2) claimant proved a compensable left upper trapezius injury; (3) the Board lacks jurisdiction to determine claimant's asserted entitlement to temporary total disability benefits or medical treatment; and (4) this matter is remanded to Judge Moore regarding whether claimant's left upper trapezius condition warrants temporary total disability benefits and/or medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²⁶

WHEREFORE, the undersigned Board Member finds that the dated October 24, 2012 preliminary hearing Order entered by Judge Bruce E. Moore is affirmed in part, reversed in part and remanded for further order consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
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Honorable Bruce E. Moore, Administrative Law Judge

²⁵ K.S.A. 44-534a.

²⁶ K.S.A. 2011 Supp. 44-555c(k).